Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

SAMUEL TIMOTHY McGRAW,

Petitioner,

v.

CAROL MARIE McCOY BOOTH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, GIVEN THAT ARBITRATION IS STRICTLY A CREATURE OF CONTRACT AND THE MANDATE OF 9 U.S.C. §§2-4 IS TO ENFORCE ARBITRATION PROVISIONS AS WRITTEN, IT IS APPROPRIATE TO CREATE AND APPLY A NEW WAIVER DOCTRINE TO CHERRY-PICK AMONG THE FEATURES OF THE ARBITRATION SPECIFIED BY THE CONTRACT WHEREBY ONE PARTY IS FORCED TO ARBITRATE IN A MANNER HE NEVER AGREED TO?

II. WHETHER THIS COURT SHOULD ENFORCE CONGRESS' EXPRESS INTENT IN THE FEDERAL ARBITRATION ACT TO HAVE THE COURTS VIGOROUSLY ENFORCE ARBITRATION PROVISIONS, AND FIND THAT THE ACT DOES NOT PERMIT NOR SHOULD IT BE CONSTRUED TO ALLOW A CIRCUIT COURT TO FIND IMPLIED WAIVER OF ARBITRAL RIGHTS WHERE A PARTY, AT THE START, EXPRESSLY SEEKS ENFORCEMENT OF THE WRITTEN ARBITRATION AGREEMENT.

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The opinion of the United States Court of Appeals for the Fifth Circuit is set forth in Exhibit A, p. 1a. The judgment of the United States District Court for the Western District of Louisiana is Exhibit B, p. 5a. The order denying rehearing is Exhibit C, p. 9a. The district court's orders to arbitrate in Louisiana are Exhibit D at p. 11a and Exhibit E at p.22a-23a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. §1254. The United States Court of Appeals for the Fifth Circuit issued its Opinion in this case on November 13, 1997. Panel Rehearing and rehearing *en banc* were timely requested. Rehearing was denied on January 5, 1998. See Appendix Exhibit C at p. 9a. This Petition was timely filed within 90 days of the panel rehearing denial, and is timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS

1. 9 U.S.C. §2 provides:

> **§2 Validity, irrevocability, and enforcement of agreements to arbitrate**
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the

refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

2. 9 U.S.C. §3 provides:

§3 Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

3. 9 U.S.C. §4 provides:

§4 Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written

district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

* * *

4. 9 U.S.C. §9 provides:

§9 Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or

corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application must be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

5. 9 U.S.C. §10 provides:

§10 Same; vacation; ground; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any

other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

6. 9 U.S.C. §16 provides:

§16 Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

* * * *

STATEMENT OF THE CASE

On March 24, 1993, plaintiff Carol Booth filed suit against defendant McGraw in Louisiana state court for damages flowing from an alleged breach of a personal services contract signed in 1989. The contract expressly required arbitration of all such disputes in New York. McGraw removed the suit to the Western District of Louisiana and immediately moved to enforce the arbitration provision via a stay of the suit in favor of arbitration *in New York* pursuant to the arbitration provision contained in the contract. Rec. at 43.[1]

Booth admitted that the contract provided for arbitration in New York, but fought the motion to stay on other grounds. Rec. at 61. On August 24, 1993, Magistrate Judge Simon issued his Recommendation which detailed why the Court had the power and obligation to stay the lawsuit in

[1] "Rec" cites are to the actual record should the Court desire to review it.

favor of arbitration in New York. His order specifically stated that "arbitration proceed in the manner provided for in the arbitration agreement between the parties." See Appendix Exhibit D, p. 11a.

On September 11, 1993 the district court accepted the Magistrate's recommendation and entered the order. See Appendix Exhibit E, p. 23a. Plaintiff failed to pursue her claims by instituting arbitration pursuant to the order and, instead, sought and obtained an informal standstill agreement in order to obtain new counsel and pursue settlement over the space of the next year. Booth did not want to incur the expense of arbitration so long as there was room to negotiate a settlement.

The parties were still discussing settlement when the matter was reallotted to District Judge Melancon in the fall of 1994. Settlement discussions had only recently broken down when an off- the-record status conference was scheduled for November 3, 1994. During the conference plaintiff complained about not being able to afford to institute arbitration in New York, at which point the court advised that, despite McGraw's earlier formal and successful request for arbitration in New York, that the Court would order immediate arbitration *in Louisiana*. On November 7, 1994 the Court entered an order requiring institution of arbitration before November 17, 1994. Rec. at 79. The initial order required plaintiff to institute the arbitration. On November 8, 1994, the district court required defendant to institute arbitration. Exhibit E, p. 23a.

Defendant did as he was ordered and timely instituted arbitration in Louisiana. A panel of three arbitrators from Louisiana and Mississippi was selected from a list of 15 arbitrators almost all of which were from Louisiana or Mississippi.

A hearing took place in November of 1995 in Monroe, Louisiana and a large award was rendered on December 4, 1995. Rec. at 114.

On December 11, 1995 plaintiff moved to confirm the award pursuant to §9 of the Federal Arbitration Act. Rec. at 112. During a telephone conference to determine McGraw's deadline to respond, the venue issue was mentioned and the court admonished McGraw's counsel that to bring it up again would be sanctionable. Defendant filed a single pleading that both opposed entry of judgment and moved to vacate on grounds relating to actions and decisions of the arbitrators as required in 9 U.S.C. §10. Rec. at 135. He did not challenge venue because the issue had already been decided by the district court, was subject to appeal at the end of the case under 9 U.S.C. §16(b), and it was not an issue within the purview of the arbitration panel which properly could be allowed by §10.

The award was confirmed on April 4, 1996 subject to a clarification that ultimately received on July 5, 1996. Final judgment was entered on August 27, 1996. McGraw timely appealed.

The appeal was duly briefed and then argued on September 4, 1997. The panel stated at the opening of the argument that the only issue was whether there was a waiver of the venue because of the year hiatus in instituting arbitration. By supplemental brief, unequivocal evidence was presented of the *plaintiff* having sought and obtained the delay for the purpose of getting new counsel and to negotiate settlement.

On November 13, the Panel issued its *per curiam* opinion affirming the district court, finding that McGraw

waived his rights because he did not reurge his earlier venue arguments (1) after the November 7 and 8, 1995 orders to arbitrate in Louisiana issued, and (2) in his motion to vacate the award under 9 U.S.C. §10. See opinion at Appendix Tab A. Panel and *En Banc* rehearings were timely sought. On January 5, 1998 the rehearing petitions were denied. See Appendix C at p. 9a.

ARGUMENT

I. FEDERAL LAW MANDATED ENFORCEMENT OF THE ENTIRETY OF THE ARBITRATION CLAUSE, INCLUDING MCGRAW'S RIGHT TO ARBITRATE IN NEW YORK.

Enforcement of *all* the terms of arbitration agreements is the explicit federal policy which Congress sought to implement in the Federal Arbitration Act. Arbitration is strictly a creature of contract. *Emery Worldwide, Inc. v. N.L.R.B.*, 966 F.2d 1003, 1007 (5th Cir. 1992). The policy favoring enforcement of arbitration clauses as written and in their entirety is so strong that the Supreme Court in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217-18, 105 S.Ct. 1238, 1241-2 (1985) found the district courts without discretion to refuse to order arbitration, quoting the "shall order" language of 9 U.S.C. §2. This Court further held that where the policy of speedy resolution conflicts with the policy of "rigorous enforcement" of arbitration agreements, the latter must prevail. 476 U.S. at 221, 105 S.Ct. at 1242-3.

The right to enforce a venue selection clause in an arbitration provision is well established. In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 92 S.Ct. 1907, 1914, 32

L.Ed. 2d 513, 520 (1972), This Court noted that "[t]he *forum clause was a vital part of the agreement* . . . . (emphasis supplied.) The Court further noted that express forum selection brings "vital certainty," and, because the parties agree to and know of the forum ahead of time, they cannot be heard to complain absent their being deprived of *all* dispute resolution fora by the agreement. *Id.*, 407 U.S. at 17-18, 92 S.Ct. at 1917.

In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.11, 94 S.Ct. 2449, 2456, n.11, 41 L.Ed. 270 (1974), this Court reversed the lower court's refusal to enforce a forum selection clause, finding that the parties had entered into "a solemn agreement . . . that such controversies be resolved elsewhere." In *Snyder v. Smith*, 736 F.2d 409, 419 (7th Cir.), *cert denied*, 469 U.S. 1037, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984), the court aptly observed:

> The right and duty to arbitrate disputes is purely a matter of contractual agreement between the parties . . . . An arbitration agreement, including its forum selection clause is a freely-negotiated contract between the parties. Courts must give effect to such freely negotiated forum clauses.

As a matter of law, McGraw was entitled to arbitration in New York City. The district court was not empowered to order arbitration in a venue not agreed to by the parties, particularly after McGraw had insisted on the New York forum from the earliest moment. Sections 3 and 4 of the Federal Arbitration Act compel enforcement of the stipulated venue as part of a single contractual right. Numerous decisions have consistently enforced such provisions. *E.g., Purdy v. Monex International, Ltd.*, 867 F.2d 1521 (5th Cir.), *cert.*

denied, 493 U.S. 863, 110 S.Ct. 180, 107 L.Ed. 136 (1989) (California venue enforced); *National Iranian Oil Co. v. Ashland Oil Co.*, 817 F.2d 326 (5th Cir. 1987) (Iranian venue enforced); *Dupuy-Busching*, 524 F.2d 1275 (New Jersey venue enforced); *M&I Elec. Indus., Inc. v. Rapistan Demag Corp.*, 814 F.Supp. 545 (E.D. Tx. 1993) (Grand Rapids, Michigan venue enforced).

Requiring a "heavy burden" of proof of waiver is consistent with 9 U.S.C. §4, which authorizes a party aggrieved by a refusal of another to arbitrate to petition "for an order directing that such arbitration *proceed in the manner provided in the agreement.*" (emphasis supplied). Likewise, 9 U.S.C. §3 requires a stay "until such arbitration has been had *in accordance with the terms of the agreement[.]*" (Emphasis supplied.) The first order issued by Judge Walter on September 11, 1993 complied exactly with the statute.[2] However, in reversing course by requiring *Louisiana* arbitration, and then entering judgment thereon, District Judge Melancon clearly erred by not following the express dictates of the statute that arbitration "proceed in the manner provided in the agreement." He entered the order with full knowledge of McGraw's position placed formally on the record that arbitration of Booth's claim must take place in New York. He told McGraw's counsel not to keep making the argument. The court had decided, and it was *not* on the basis of waiver.

Involved here was an entertainment-related services contract best understood by those arbitrators available in cities where the industry resides — New York City being one of a few obvious choices. Here, *plaintiff* had the contract drafted, and it was she who suggested the New York arbitration venue. Yet when it came time to bring a claim, Booth

[2] See Appendix Exhibits D and E at pp. 11a and 23a.

engaged in the most blatant forum shopping imaginable — all in clear violation of the very agreement from which her claim for money damages purported to flow:

> In the event of any dispute under or relating to the terms of this agreement, or the breach, validity or legality thereof, it is agreed that the same *shall be submitted* to arbitration to the American Arbitration Association *in New York City*, ...

Judge Walter was eminently correct in accepting Magistrate Judge Simon's well-reasoned Recommendation enforcing this provision as written. Judge Melancon clearly erred in suddenly reversing course and, *sua sponte*, ordering defendant to arbitration in Louisiana where it was undisputed that the parties had agreed in writing to arbitrate only in New York City.

The great importance of the issues presented herein for *certiorari* by this Honorable Court flows from the inherent conflict between the Fifth Circuit's decision and the core principles of the Federal Arbitration Act as well as an unwarranted shift from established principles heretofore governing the preservation of issues for appeal. With regard to arbitration venues agreed to in contracts, it is the *express* policy of the United States to encourage arbitration by liberally enforcing the *whole* agreement to arbitrate *as written*. *See, e.g., Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir.), *cert. denied*, 464 U.S. 1009, 104 S.Ct. 529, 78 L.Ed.2d 711 (1983) (Arbitration is a voluntary selection to eschew the courts in favor of arbitrators versed in the types of commerce involved).

Enforcement of the stipulated arbitration forum is nothing new. For example, in *Texas San Juan Oil Corp. v. An-Son Offshore Drilling Corp.*, 198 F.Supp. 284, 285-6 (S.D.N.Y. 1961), the court, simply on the basis of the forum selection clause, refused to transfer the arbitration from New York to Louisiana, where both parties did business: "There appears to be no substantial reason why the respondent should be relieved from its contractual obligations." Inconvenience of the forum chosen is of no consequence and does not justify a failure to abide by the contracted-for venue. *E.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.11, 94 S.Ct. 244, 41 L.Ed.2d 270 (1974).

The federal courts have found that enforcement of the venue chosen the agreement is so important as to prime other language in the act which appeared to limit arbitration proceedings to the district where the court sits. *Dupuy-Busching Gen. Agency v. Ambassador Ins. Co.*, 524 F.2d 1275 (5th Cir. 1975). Moreover, it is the long- standing principle that there is a presumption *against* waiver of arbitral rights and waiver is never recognized absent compelling proof. Specifically, a party asserting a waiver has a "heavy burden" of proof. *E.g., Walker v. J.C. Bradford, Co.*, 938 F.2d 575, 577 (5th Cir. 1991); *Tenneco Resins v. Davy Inter., A.G.*, 770 F.2d 416, 420- 21 (5th Cir. 1986); *Southwest Industrial Import & Export Co. v. Wilmod Co., Inc.*, 524 F.2d 468, 470 (5th Cir. 1975); *Sibley v. Tandy Corp.*, 543 F.2d 540, 542 (5th Cir. 1976), *cert. den.*, 434 U.S. 824 (1977).

The Fifth Circuit's decision departs from these time-worn principles and even more important, the policy of enforcement of arbitral venue contained in Sections 3 and 4 of the Federal Arbitration Act. The instant decision reverses course and creates a liberal implied waiver theory in order to escape the dictates of the arbitration contract.

As a look at the three-page *per curiam* opinion discloses, there was absolutely no acknowledgment or analysis of, much less any weight given, to Congressional policies favoring enforcement of the specified venue and the entire arbitration agreement as one indivisible right. As the following arguments will demonstrate, the creation of a new doctrine here conflicts with precedent of other circuits and opens a hole in the heretofore seamless hull that is the Federal Arbitration Act.

II. THE ESTABLISHED RULE OF ISSUE PRESERVATION IS THAT A PARTY'S POSITION NEED ONLY BE RAISED ONCE IN ORDER TO PROTECT THE ISSUE FOR APPEAL.

The circuit courts heretofore have consistently applied the rule that a party need only once bring its position to the district court's attention in order to preserve the issue for appeal. As the Fifth Circuit said in *Thurber v. Fairchild Motor Corp.*, 269 F.2d 841, 843 n.3 (5th Cir. 1959), a party "is entitled to accept the Court's ruling at face value." More recently, in *Bender v. Brumley*, 1 F.3d 271, 277 (5th Cir. 1993), the Court reiterated the long- standing rule that a party who "states his assertions to the trial court," hereafter has no obligation to reiterate his previously asserted position in order to preserve the issue for appeal. The Court further ruled that the lack of on-record objections after an order is made will *not* defeat a party's right to appeal the ruling. The earlier statement of position carries over. *Id.* In *Tenneco*, 770 F.2d at 420-21, the court emphasized the extra heavy burden of establishing waiver, citing numerous cases in support.

Other circuits recognize the same rule. For example, in *Stone v. Morris*, 546 F.2d 730, 736 (7th Cir. 1976) the

Court found that as long as the Court and other parties are aware from earlier proceedings of a party's position, a further formal objection is not required after an adverse *sua sponte* ruling on the subject is made. *See also Amer. Home Assur. Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3d Cir. 1985) (Earlier motion asserting legal position sufficed to preserve issue despite lack of contemporaneous objection); *Larson v. Neimi*, 9 F.3d 1397, 1399 (9th Cir. 1993) (There is full preservation of the issue where the court is "fully aware" of a party's position from previous discussion. "Further objection would have been unavailing."); *U.S. v. Mejia-Alarcon*, 995 F.2d 982, 986-8 (10th Cir.), *cert. den.*, 510 U.S. 927, 114 S.Ct. 334 (1993) (same); *Hasselbrink v. Speelman*, 246 F.2d 34, 39 (6th Cir. 1957) (same); *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1173 (2nd Cir. 1970) (There was no need for further objection when position earlier is made "abundantly clear.")

The issue as raised in *Hartford Lloyd's Ins. Co. v. Teachworth*, 898 F.2d 1058, 1060-61 (5th Cir. 1990), is virtually identical to the situation presented here. In *Teachworth*, the district court had originally ruled that the claim was not subject to arbitration under the FAA. Much later, the court issued a *sua sponte* order that the matter *was* subject to the Federal Arbitration Act. Hartford, who had earlier contested the applicability, thereafter made no objection and failed to file a request for reconsideration even though the Court offered a five-day period for such a filing. *Id.* at 1060.

The Fifth Circuit found that Hartford had *not* waived its right to bring up the issue on appeal after the arbitration award was made. Why? Because the district court was aware of Hartford's contrary position *from its earlier filings*: "In this case, there is no doubt that the district court and Teachworth knew Hartford's position on the applicability of the

FAA," and went on to identify where Hartford had specified its position in motion papers filed earlier in the proceedings. Ultimately, the Court reversed the erroneous *sua sponte* decision. *Id.* at 1063.

McGraw clearly stated and explained his demand for a New York venue on the record soon after the case was removed to federal court. The first judge agreed and approved a detailed opinion on the power of the court to order arbitration in New York, outside the Western District of Louisiana. The second district judge decided to reverse the earlier order and told McGraw's counsel not to reurge it after the arbitration panel had ruled or McGraw would be sanctioned for wasting the Court's time. Under any interpretation of F.R.C.P. Rule 46 ever made by any court, the issue was preserved for appeal. Moreover, there was no authority to selectively "waive" venue and thereby create an arbitration modality never agreed to by both parties.

III. THE IMPLIED WAIVER FOUND BY THE FIFTH CIRCUIT IS UNPRECEDENTED AND RELEGATES ARBITRATION CLAUSE ENFORCEMENT TO SECONDARY STATUS.

The Fifth Circuit ruled that McGraw "forfeited" his right to the venue specified in the contract because (1) he made no separate objection following the November 1995 orders to arbitrate in Louisiana, and (2) he did not raise venue as a challenge to confirmation of the arbitrator's award. Reason (1) is squarely repudiated by *Teachworth* and *Bender* and the host of authorities set forth at page 13 above. Reason (2) is an unprecedented ground that has no record support and flies in the face of the trial court's threat of sanctions should this issue be raised again. Moreover, the Fifth Circuit read

§10 of the Act as establishing waiver of any issue not raised in a motion to vacate under §10, even though §10 limits the scope of allowed grounds to decisions made by the arbitrators, *not* ones decided by the judge.

As the foregoing establishes, the policy of Congress unequivocally expressed in 9 U.S.C. §§3-4 is to enforce arbitration as agreed to by the parties. Inconvenience and cost of the forum is irrelevant. *Scherk*; *M/S Bremen*. The district court had no discretion in the matter under §3 of the Act. *E.g.*, *Bhatia v. Johnson*, 818 F.2d at 421 (5th Cir. 1987).

Moreover, as 9 U.S.C. §10 establishes, appeals on the merits are highly circumscribed. Venue decisions made by the Court are *not* properly part of a §10 motion to vacate. This becomes crystal clear when the language of §10 is reviewed. There are four categories of attack listed in subparts (a)-(d) of §10, all of which deal with actions and decisions *of the arbitration panel.*[3] None of these address

[3] 9 U.S.C. §10's categories are:

> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded

erroneous decisions made by the district court in applying the dictates of §§2, 3 and 4 of the Act.

In the instant case, it was the district court who *ordered* McGraw to arbitrate in Louisiana. The AAA in New Orleans was therefore *asked* to provide a panel in Monroe, Louisiana. The district court made the venue decision, not the arbitrators. It would have been absurd and utterly useless for McGraw, given the strictures of 9 U.S.C. §10, to have petitioned the district court to vacate the arbitration award on the ground the arbitration took place in Louisiana rather than New York. It was never something that the arbitrators had to decide and accordingly, there could be no reason to raise the issue under §10. The appeal of the venue issue was governed only by 9 U.S.C. §16(b).

McGraw's lawyers were cognizant of and relied on 9 U.S.C. §16(b), which Congress enacted in 1990 to change the way to appeals of errors by the district courts in connection with ordering arbitration to occur. Before 1980, an immediate interlocutory appeal had been available because of the injunctive aspect of a stay order. The old procedure resulted in venue orders being reviewed and corrected *before* arbitration actually took place. *E.g., Scherk*, 417 U.S. 506 (U.S. 1974).

> their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Congress then decided that such appeals should be treated the same as other cases where the appeal is deferred until the entry of judgment. *E.g.*, F.R.C.P. Rule 54(b). Unlike the Federal Rules, however, 9 U.S.C. §16(b) does not allow an interlocutory certification like Rule 54(b), and thus *mandates* a delayed appeal of an order to arbitrate in a particular venue.

District court orders on venue of arbitrations clearly are not appealable where rendered. Given §16(b), the same rules governing preservation of issues for appeal should apply, just as they do to other interlocutory decisions rendered by a district court. It was contrary to §16(b) for the Fifth Circuit to have imposed a forfeiture of crucial arbitral rights on a party who reasonably relied on Congress' 1990 amendment in saving for the §16 appeal erroneous decisions made by the district court.

IV. THE DISTRICT COURT WAS FULLY AWARE OF MCGRAW'S POSITION THAT A NEW YORK VENUE WAS REQUIRED AND NEVER MADE A FINDING OF WAIVER; ABSENT UNEQUIVOCAL EVIDENCE, WAIVER OF ARBITRAL RIGHTS SHOULD NEVER BE IMPLIED.

The established law of the circuit courts is that a party who fairly brings to the district court's attention his legal position thereafter has that issue preserved for appeal upon entry of final judgment as defined by F.R.C.P. Rule 54(b). *Bender v. Brumley*, 1 F.3d 271, 277 (5th Cir. 1993) (a party does not have to reiterate his previously asserted position in order to appeal an adverse ruling); *Thurber v. Fairchild Motor Corp.*, 269 F.2d 841, 843 n.2 (5th Cir. 1959) (a party "is entitled to accept the Court's ruling at face value" and has

no obligation to re-urge positions in order to appeal).[4] There is no requirement that a party who is unsuccessful on a legal point duly raised has to re-urge it at any further stage of the proceedings or face a waiver. If the district court erred, the party may then bring it to the attention of the Court of Appeals and have the error rectified. This is *exactly* what the Court did in *Hartford Lloyd's Ins Co. v. Teachworth*, 898 F.2d at 1060-61 (5th Cir. 1990).

The significance of what the Fifth Circuit did in this case is clear. The fundamental rule of presumption against waiver and the concomitant burden of proof of waiver were turned on their heads with absolutely no citation of authority or consideration of the equal applicability of the *Teachworth*, *Bender* or *Tenneco* preservation rule to arbitration orders and any other interlocutory rulings.

If allowed to stand, the Fifth Circuit's ruling carves out an "arbitration order" exception to the general rule governing issue preservation. Left untouched, this case stands for the proposition that waiver *is* to be easily implied, even in the absence of any waiver ruling by the district court. This carve-out occurs in the face of Congressional acts which decree: (1) the policy of Congress is to enforce venue selection clauses in arbitration agreements (9 U.S.C. §§2-4) and (2) orders to arbitrate are to be treated like other interlocutory orders with respect to appeals (9 U.S.C. §16(b)).

Finally, the carve-out takes away from arbitration parties the benefit of a long-held principle applicable to parties

[4] *See also, e.g., Stone v. Morris*, 546 F.2d 730, 736 (7th Cir. 1976); *Amer. Home Assur. Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 324 (3rd Cir. 1985) and other cases on this point cited at p. 13 above.

that there is a presumption *against* waivers of venue. Put another way, they are not to be lightly inferred and require compelling proof. *Tenneco Resins*, 770 F.2d at 420-21 (5th Cir. 1985) and cases cited therein. This policy is particularly needful of enforcement when arbitrations covered by the FAA are involved. Commercial interests will shy away from agreeing to arbitrate if they are not sure that *all* of their specified terms for arbitration will be respected. This is diametrically opposed to Congress' intent as expressed in §§2, 3 and 4 of the Federal Arbitration Act. Given 9 U.S.C. §16(b), there was no justification for the Fifth Circuit to retreat from this time honored rule or to punish a petitioner because his attorney reasonably relied on that rule during the course of proceedings below.

In the context of the instant case, the Fifth Circuit had no record of proof of waiver, much less anything that could satisfy the requisite "heavy burden." Indeed, the record is to the contrary in displaying defendant's explicit assertion of his right to venue *in New York* as his first motion. McGraw thereby preserved the issue as a matter of law. *Southwest Industrial*, 524 F.2d at 470. Moreover, the district court demanded that the issue *not* be reurged. He had made up his mind. Under Rule 54(b), any interlocutory decision may be reversed *sua sponte*, which is what Judge Melancon did in November of 1994. However, the Fifth Circuit repudiated Rules 54(b), 46 and 9 U.S.C. §16 by imposing a waiver *on appeal* because McGraw followed the rules. The result here only serves to reward the plaintiff for her blatant forum shopping and encourages other improper attempts to unilaterally evade "solemn agreements" by preemptive forum shopping.

On a conceptual level, it is inescapable that the Fifth Circuit arrived at a waiver only by sidestepping the well-

established precedents found throughout the circuit courts.[5] Waiver cannot be found here without: (1) repudiating the "raise it once" rule applicable to preserving an issue for appeal *and* (2) withdrawing the rule that a "heavy burden" of proof necessary for a finding of waiver.

The Fifth Circuit's decision here retreats from these time- worn principles. Looking again at the reasons given below, the Fifth Circuit's decision here refers to two things in arriving at its conclusion of waiver of the vital right to a New York venue for the entertainment industry dispute. First, the court noted that McGraw did not file an objection to the November 6-7 orders to arbitrate in Louisiana. Second, he did not include a waiver challenge in his motion to vacate the award under 9 U.S.C. §10.

The Fifth Circuit referred in passing to the obligation of McGraw to institute arbitration as suggested in the district court's November 8 order. However, such is neither obvious nor relevant to the waiver at issue. It was Booth who had asked McGraw to defer arbitration in order to pursue settlement for some 12 months, which efforts ultimately were unsuccessful. The Fifth Circuit ironically had earlier held in another case that pursuing settlement is *not* a ground for waiver. *Southwest*, 524 F.2d 468; *Walker*, 938 F.2d at 578. The terms of the arbitration agreement set no deadline nor did it state that party against whom a claim was made had the duty to commence arbitration. Under *Teachworth* and numerous other cases,[6] the issue is whether the Court knew of McGraw's position from earlier filings — something he clearly did. Under *Tenneco*, the issue is whether McGraw

[5] See cites at pp. 13 and 17 above.
[6] *Id.*

asked for arbitration and if so, is there compelling proof of a waiver thereafter.

Did McGraw ever *agree* to arbitrate in Louisiana? Never. He simply obeyed the trial court's direct order which came after McGraw had expressly sought a New York venue. The only New York venue that McGraw ever requested was New York and the district court was well aware of McGraw's position when he rejected it. Waiver never occurred. Whether or not he or Booth had the duty to initiate arbitration of *Booth's* claim is of absolutely no moment *vis-a-vis* waiver, because the Court's order left no room to do anything but arbitrate in Louisiana despite the contrary language of the agreement. He is not required to subject himself to a contempt citation in order to preserve the issue for appeal. *E.g., United States v. United Mine Workers of America*, 330 U.S. 258, 293, 67 S.Ct. 677 (1947) (a district court's orders must be obeyed until reversed on appeal).

Not only would the trial court have noted a waiver or agreement if it occurred, counsel for plaintiff would have crowed about it in his appellee's brief. He did not do so because it never occurred. There is no mention of Judge Melancon ordering Louisiana venue as a sanction and it would have made no sense to do so, as McGraw had done nothing wrong and arbitration, if done at all, must be accomplished consistent with *all* of the terms of the contract, not just some. Absent proof in the record, even a minute entry, then waiver cannot properly be found. The Fifth Circuit's implying a waiver under these circumstances means that arbitration judgments are to be treated more harshly than others, thus reading out of existence 9 U.S.C. §16(b) as well as 9 U.S.C. §§3-4.

As for the motion to vacate, 9 U.S.C. §10 and 9 U.S.C. §16(b) say it all. McGraw should not be made to forfeit valuable rights and over a million dollars because his counsel reasonably relied on Acts of Congress in deciding what issues were appropriate to raise in the FAA §10 challenge.

Waiver is not to be lightly implied. Without heavy proof, waiver is *not* to be found, particularly in arbitrations where a party has asked for arbitration at the start. That is established law ignored by the Fifth Circuit's opinion, as no waiver had ever been found by the district court and the record is crystal clear in proving that petitioner had expressly sought venue enforcement from the very beginning. It is crucial to the continued integrity of the arbitration process and to 9 U.S.C. §§2-4 that the issue be resolved via *certiorari*.

Conclusion

The Court should grant *certiorari* to review this important matter. The uniformity of enforcement of agreements to arbitrate is an express national policy. So is the rejection of judicial antipathy to enforcing arbitration agreements as written. The courts are not free to pick and choose among the contract provisions which outline the exact manner by which arbitration shall take place. The district and circuit courts need guidance as to the standard that applies for finding of waiver of arbitral rights, and, in particular, whether §10 of the Act, in limiting substantive attacks on decisions made by the arbitrators, is to be properly used as grounds to imply waiver of rights to contract enforcement expressly stated in §2, 3 and 4 of the same Act. The Fifth Circuit's ruling is a novel but shortsighted one which contradicts several lines of controlling authority. It improperly approves cherry-picking parts of a single arbitration contract to

produce an arbitration agreed to by neither of the parties, and thus undermines the uniformity demanded by Congress and those who would choose to agree to arbitration. Avoiding the deleterious effect on the heretofore stable law of arbitration is something worthy of *certiorari* by this august body.

The Court should grant *certiorari*, reverse the Fifth Circuit and order that the petitioner was entitled to arbitration of the dispute in New York as specified in the arbitration agreement.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-31026

CAROL MARIE MCCOY BOOTH,
Plaintiff-Appellee,

versus

BILLY R. HARGISS and ANGELYN RIZZO HARGISS,
Co-Adminsitrators of the Succession of Attorney WIlliam A. Hargiss, Deceased,
Plaintiffs-Appellees-Intervenors,

SAMUEL TIMOTHY MCGRAW, also known as Tim McGraw,
Defendant-Appellant.

Filed: 11/13/97

Appeal from the United States District Court for the Western District of Louisiana (93-CV-741)

Before POLITZ, Chief Judge, BENAVIDES and PARKER, Circuit Judges.
PER CURIAM:[1]

This appeal rises out of a dispute between country singer Samuel Timohty McGraw ("McGraw") and his erstwhile personal manager Carol Maire McCoy Booth

[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published an is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

("Booth"). Booth brought suit against McGraw in Louisiana state court in March 1993, alleging that McGraw had breached his "personal manager contract" with her. McGraw timely removed the case to federal district court in Louisiana. Eventually, the district court ordered the parties to arbitrate their dispute in Louisiana. McGraw complains on appeal that this order was contrary to his con tract with Booth, which provides that any dispute between them would be "submitted to arbitration to the American Arbitration Association in New York City . . . ."

On removal, McGraw filed d a motion to stay the proceedings under Section 3 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et *seq.*, and sought an order that the matter be arbitrated in New York City in accordance with he parties' agreement. Based on the recommendation of a magistrate judge, the district court granted the requested stay and ordered the parties to arbitrate the matter "in the manner provided for in the arbitration agreement between the parties."

In the wake of that order , neither party initiated arbitration in New York. Instead, the matter languished on the district court's docket for almost fourteen months. The case was reassigned to another district judge, which held a status conference in November 1994. Initially, the district court ordered Booth, the plaintiff, to initiate arbitration pro r in Louisiana. In the same order, however, the district court directed McGraw to provide "authority . . . for the pr position that the plaintiff has the obligation of initiating arbitration." A minute entry several days later reflects that the district court found that the authority McGraw provided was inadequate and accordingly ordered McGraw to initiate arbitration.

McGraw complied with the district court's order to arbitrate without any objection to the location specified in the order, and the matter proceeded to arbitration in Monroe, Louisiana. An arbitration panel awarded Booth approximately $321,000 in damages, $125,000 in attorneys' fees, and $15,000 for the costs of arbitration .

Booth made a motion in he district court for confirmation of the arbitration award. *See* U.S.C. § 9. Although McGraw opposed the confirmation, he did not object based on improper venue. McGraw also moved to vacate he arbitration award. *See* 9 U.S.C. §10. Again, he failed to raise improper venue as a basis for vacating the arbitration ward. The district court entered judgment on the arbitration award. McGraw timely appealed.

In these circumstances, McGraw, by his inaction, forfeited the right to complain of the district court's order that the matter be arbitrated in Louisiana.[2] After obtaining a stay of the proceedings, McGraw failed t initiate arbitration in New York for fourteen months. Under the holding of the district court at the end of those fourteen months the burden of initiating arbitration was on McGraw. McGraw doers not challenge this holding on appeal. Moreover, when the district court finally took action to move the case in November 1994, McGraw made no objection to arbitration in Louisiana .

We recognize that McGraw had no obligation to seek interlocutory review of this order; under the FAA, 9 U.S.C. §

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[2] McGraw arguers that Booth's attempts to settle the case along with a change in counsel before the November 1994 order to arbitrate in Louisiana insulate him against a finding of waiver. Under different circumstances, we might agree, but under the circumstances presented her , we reject his contention.

16 (b) , an interlocutory apply normally cannot be taken from an order referring a matter to arbitration. McGraw, however, raised no objection whatsoever to venue at the time the district court ordered the arbitration to proceed in Louisiana; nor did he raise the venue issue in opposition to Booth's motion to confirm the arbitration award or in h.i motion to vacate it. Under these circumstances, McGraw willed not be heard to complain about the venue for the arbitration and is bound by the arbitration award.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
Monroe Division

Carol Marie McCoy Booth
Plaintiff

Civil Action No. 93-0741
Judge Tucker L. Melancon

v

Samuel Timothy McGraw
Defendant

FINAL JUDGMENT
INCORPORATING CLARIFICATION OF AWARD

Filed: 8/27/96

This matter having been remanded to the Arbitration Panel for clarification of the Arbitrators' Award and the Arbitrators having clarified the Award;

IT IS ORDERED that Judgment be and is hereby entered favor of Plaintiff Carol Marie McCoy Booth and against Defendant Samuel Timothy McGraw pursuant to 9 U.S.C. 9, upon the Award of Arbitrators, as clarified, entered in Case Number 69 140 0110 94

In the Matter of Arbitration Between Samuel Timothy McGraw and Carol Marie McCoy Booth as follows:

A. The contract between Samuel Timothy McGraw and Carol Booth date April 18, 1989, is valid and enforceable .

B. Carol Booth is entitled to $320,917.28 for all monies due Carol Booth under that contract dated April 18, 1989, up to and including December 31, 1994. The Curb Record contract and the Sony-Signature "Deal Memo" contract are separate contracts that came into being during the term of the April 18, 1989 contract between Carol Booth and Tim McGraw. Carol Booth is also entitled to 15% of the gross monies or other considerations received by Tim McGraw under that certain contract dated October 22, 1992, between Tim McGraw and Curb Records and is also entitled to 15% of the gross monies and other considerations received by Tim McGraw under the Sony-Signature, Inc. contract entitled "Deal Memo." Ms. Booth shall be entitled to this percentage of the gross monies and other considerations received by Tim McGraw under these two contracts from January 1, 1995, until each of these contracts terminates by their terms. Ms. Booth is not entitled to any monies from any tours or bookings of Mr. McGraw under the CAA contract, except for those bookings consummated as of April 18, 1994, which are included in the above award of $3 0,917.28.

C. Carol Booth is entitled to reasonable attorney fees and other costs incurred in the enforcement of the contract dated April 18, 1989, in the amount of $125,000.00.

The compensation an expenses of the arbitrators totaling $17,044.80 shall be borne by Samuel Timothy McGraw, hereinafter referred to as CLAIMANT. Therefore CLAIMANT shall pay to Carol Booth, hereinafter referred to as

RESPONDENT, the sum of $7,250.00 for that portion of the compensation previously advanced by RESPONDENT to the Association. CLAIMANT shall pay to the American Arbitration Associati n the sum of $2,557.30 for said compensation still due the arbitrators.

The administrative fees and expenses of the American Arbitration Association totaling $4,389.00 shall be borne by CLAIMANT. Therefore, CLAIMANT shall pay to RESPONDENT the sum of $1,234.48 for that portion of its share of administrative fees and expenses previously advanced by RESPONDENT to the Association. CLAIMANT shall pay to the Ame ican Arbitration Association the sum of $210.02 for Administratiave fees and expenses still due the Association.

This Award is in full settlement of all claims submitted to this arbitration.

IT IS FURTHER ORDERED that interest be awarded at the provided for by 28 U S.C. 1961 on the sums set out in the Award of Arbitrators from the date of original entry of Judgment herein on April 4, 1996, and on any additional sums which become due after that date, from the respective dates 30 days after any such sums are paid to McGraw.

THUS DONE AND SIGNED this 27th day of July, 1996, at Monroe, Louisiana.

Tucker L. Melancon
United States District Judge
APPROVED AS TO Form:

Judgement Entered
08/28/96
BY COPY

Willaim A.Hargiss
Attorney for Carol Marie McCoy
Booth

W. CRAIG HENRY
Attorney for Samuel Timothy
McGraw

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-31026

CAROL MARIE MCCOY BOOTH,
Plaintiff-Appellee,

versus

BILLY R. HARGISS and ANGELYN RIZZO HARGISS,
Co-Adminsitrators of the Succession of Attorney WIlliam A. Hargiss, Deceased,
Plaintiffs-Appellees-Intervenors,

SAMUEL TIMOTHY MCGRAW, also known as Tim McGraw,
Defendant-Appellant.

Filed: 1/5/98

Appeal from the United States District Court for the Western District of Louisiana (93-CV-741)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 11/13/97, 5 Cir., _____, _____ F.3d _____)

Before POLITZ, Chief Judge, BENAVIDES, and PARKER, Circuit Judges. PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R.APP.R. and 5TH CIR.R. 35) the Suggestion for Rehearing En Banc is also DENIED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
Monroe Division

Carol Marie McCoy Booth
Plaintiff

Civil Action No. 93-0741
Judge Tucker L. Melancon

v

Samuel Timothy McGraw
Defendant

REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Filed: 8/24/93

Procedural Background

Before the Court is a motion to stay this proceeding and to enforce an arbitration clause in a contract between the parties brought by the defendant, Samuel Timothy McGraw ("McGraw") . The arbitration clause in question reads as follows:

> "In the event of any dispute under or relating to the terms of this agreement, or the breach, validity or legality thereof, it is agreed that the same shall be submitted to arbitration to the American Arbitration Association in New York City, and in accordance with the rules promulgated by the said association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. In the event of litigation or arbitration the prevailing party shall be entitled to recover any and all reasonable attorneys fees and

> other costs incurred in the enforcement of the terms of this agreement, or for the breach thereof. This arbitration provision shall remain in full force and effect notwithstanding the nature of any claim or defense hereunder."

McGraw contends that the agreement to arbitrate is enforceable under both the Federal Arbitration Act ("FAA"), 9 U.S.C. 51, et seq, and, alternatively, under the Louisiana Arbitration Law, R.S. 9:4201, et seq.

Section 2 of the FAA provides, in pertinent part:

> "A written provision in any. . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract. . . or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

A party who is aggrieved by the filing of a suit in violation of such an agreement to arbitrate finds his remedy in 53, which provides:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay

is not in default in proceeding with such arbitration."

The lawsuit presently before this Court was initially filed in the Fourth Judicial District Court, Ouachita Parish, Louisiana, on March 24, 1993, and was removed to this Court by McGraw on April 29, 1993, on the basis of diversity of citizenship. Then on June 25, 1993, McGraw filed the motion that is presently before the Court. McGraw has not filed any answer or other pleading in response to the plaintiff's petition.

The petition was filed by Carol Booth ("Booth") alleging that the parties entered into a written contract dated April 18, 1989, whereby McGraw agreed to employ Booth as his personal manager for a period up to 15 years. A copy of the contract attached to the petition shows that McGraw agreed to pay Booth, as compensation for her services, a sum equal to 15 percent of any and all gross monies or other considerations received by McGraw as a result of his career in the entertainment industry. Booth alleged that she composed and published music for McGraw, promoted his recordings and public appearances, and secured the attention of major companies in Nashville, Tennessee, and as a direct result, McGraw signed a major label contract, but that thereafter, McGraw failed to pay Booth the compensation required by the contract and refused any communications with Booth. As relief, Booth is seeking specific performance of the contract, and, in the alternative, damages for alleged breach of contract, attorney's fees, penalties, interest and costs.

Booth makes four contentions as to why McGraw's motion should not be granted.

Booth's First Contention

Initially Booth contends that the arbitration provision of the contract is optional, so that she has a legal right to maintain her action in federal court, citing the following clause:

> "In the event of litigation or arbitration the prevailing party shall be entitled to recover any and all reasonable attorney's fees and other costs incurred in the enforcement of the terms of this agreement, or for the breach thereof."

Booth contends that the quoted provision states that the parties have a right to litigate in the judicial system or to submit to arbitration under the terms provided in the contract. I disagree.

The arbitration provision of the contract clearly states that any dispute relating to the contract shall be submitted to arbitration. The clause would have to say that any dispute "may" be submitted to arbitration in order to indicate that arbitration was optional.

The clause that mentions litigation apparently recognizes that one of the parties may try to do exactly what Booth did in this case, file a suit for resolution of a dispute in a court, despite the agreement to arbitrate any dispute. The contract thus provides that the Prevailing party in any such circumstance would be entitled to recover attorney's fees and costs incurred in the enforcement of the terms of the contract or for the breach of the contract, regardless of whether those fees and costs were incurred in litigation in court or in arbitration.

Booth's Second Contention

Secondly, Booth contends that McGraw waived his right to arbitration by invoking the jurisdiction of the federal court. She cites two cases in support of her contention that by removing the matter to federal court, without simultaneously requesting arbitration, McGraw waived any right to arbitration. However, the two cited cases are not authority for the proposition contended by Booth.

"The question of what constitutes a waiver of the right of arbitration depends on the facts of each case." Walker v. J. C. Bradford & Co., 938 F.2d 575 (5th Cir. 1991), citing Tenneco Resins. Inc. v. Davy Int'l AG, 770 F.2d 416, 420 (5th Cir. 1985). "Waiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party." Walker, supra, citing Miller Brewing Co. v. Ft. Worth Distrib. Co., 781 F.2d 494, 497 (5th Cir. 1986) .

The courts hesitate to find that a party has waived its contractual right to arbitration, and indulge a presumption against finding waiver. A party asserting waiver thus bears a heavy burden of proof in its quest to show that an opponent has waived a contractual right to arbitrate. Walker supra, and cases therein cited.

The test for determining whether one has impliedly waived a right to arbitrate takes into account the extent to which judicial resources have been used, inconsistency of actions taken with asserting arbitration, and the prejudice to the party opposing arbitration. Price v. Drexel Burnham Lambert. Inc., 791 F.2d 1156 (5th Cir. 1986). In the case at bar, McGraw has hardly used any judicial resources, none of his actions are inconsistent with asserting arbitration, and

Booth has not shown that she has suffered or will suffer any prejudice by McGraw's delay in seeking arbitration McGraw's simply removing this case to the federal court and then filing his motion could hardly be considered substantially invoking the judicial process to the detriment or prejudice of Booth .

The time within which McGraw could remove this suit to federal court was limited. If he had attempted to enforce the arbitration agreement in the state court suit, he would have been time barred from removing the suit to federal court if he had waited for a decision by the state court and been denied relief. Thus, McGraw's removal of the suit to federal court was not an action inconsistent with asserting arbitration.

I find that McGraw did not waive his right to invoke the arbitration provision of the contract.

Booth's Third Contention

Thirdly, Booth contends that this Court is without authority to transfer this case to arbitration in New York, citing Sec. 4 of the FAA which provides, in pertinent part, as follows:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28,...of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in

> such agreement.... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed."

Booth cites the case of Econo—Car International. Inc. v. Antilles Car Rentals. Inc., 499 F.2d 1391 (3d Cir. 1974) in support of her contention, pointing out that in that case, the district court of the Virgin Islands refused to compel arbitration in New York City, as specifically provided in an agreement between the parties, because of the language of Sec. 4 which mandates that a court that orders arbitration shall direct that the arbitration proceeding shall be within the district in which the petition for an order directing such arbitration is filed.

In the cited case, the plaintiff, Econo-Car, had advised the defendant, Antilles, that Econo-Car desired to submit their disagreements to arbitration in New York City in accordance with their agreement, but Antilles refused to submit to arbitration, and Econo-Car filed a petition in the district court of the Virgin Islands to compel arbitration. It was then Econo-Car that sought to have the court order the arbitration to be in New York City and Antilles opposed it.

McGraw correctly cites the case of Dupuy-Busching General Agency. Inc. v. Ambassador Ins., 524 F.2d 1275 (5th Cir. 1975) as being more precisely on the point in this case, and as properly reaching an opposite result from the Econo-Car decision.

In Dupuy-Busching, the defendant, Ambassador, had given notice of a demand for arbitration in New Jersey under the terms of an agreement between the parties, and Dupuy-Busching then filed suit in Mississippi State Court to enjoin the arbitration and to revoke its agreement to arbitrate. Ambassador then removed the case to United States District Court on the basis of diversity and asked the federal court to order that arbitration proceed in New Jersey in the manner provided for in the arbitration agreement.

The Fifth Circuit distinguished Dupuy-Busching from Econo-Car on the basis that Dupuy-Busching, the party seeking to avoid arbitration in Dupuy-Busching, brought suit in Mississippi, whereas the party seeking arbitration, Econo-Car, had brought the suit in that case. The court noted that in Dupuy-Busching, the defendant, Ambassador, who removed the case to federal court, did not invoke the jurisdiction of the Mississippi court, but only responded to the actions of Dupuy-Busching. In holding that Dupuy-Busching must arbitrate in New Jersey, the Fifth Circuit concluded the following:

> "...Where the party seeking to avoid arbitration brings a suit for injunctive relief in a district other than that in which arbitration is to take place under the contract, the party seeking arbitration may assert its Sec. 4 right to have the arbitration agreement performed in accordance with the terms of the agreement."

Booth's Fourth Contention

Finally, Booth contends that her contract with McGraw does not involve interstate commerce, and,

therefore, is not enforceable under the Federal Arbitration Act. Booth points out that the federal act only applies to an arbitration provision in a "contract evidencing a transaction involving commerce". Commerce is simply defined in the pertinent part of Sec. 1 of the Act as "...commerce among the several States...".

Booth cites the case of Conley v. San Carlo opera Co., 163 F.2d 310 (2d Cir. 1947) as holding that a contract whereby a singer gave an opera company an option on his services did not involve interstate commerce and therefore the federal court had no jurisdiction under the Arbitration Act.

In 1972, the Second Circuit reconsidered its 1947 decision in the San Carlo case in Erving v. Virginia Squires Basketball Club 468 F.2d 1064, 1069 (2d Cir. 1972). The Erving court found that its holding in San Carlo that a contract for personal service with a business engaged in interstate commerce is not within the Arbitration Act, appears to be inconsistent with a later decision of the United States Supreme Court in the case of Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401 n. 7, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Erving then held that a contract of a professional basketball player to play for a professional basketball club was a contract evidencing a transaction involving commerce within the meaning of 9 U.S.C. Sec.2 Additionally, the case of Haviland v. Butz, 543 F.2d 169 (D.C. Cir. 1976) held that a traveling dog and pony show "affected commerce" within the meaning of the Animal Welfare Act, based in part on the fact that the act was presented to paying audiences in a number of states and had occasionally appeared on commercial television.

Booth alleged in her petition in this Court that her

"efforts.., resulted in area and nationwide exposure of and acceptance of defendant," and in her petition as well as her opposition to McGraw's motion, Booth stated that she "secured the attention of major companies in Nashville, Tennessee, and as a direct result, enabled defendant to sign a major label contract."

Additionally, the copy of the contract here in question which Booth attached to her petition reads, in pertinent part, as follows:

> "In compensation for your services I agree to pay to you, as and when received by me, and during and throughout the term hereof, a sum equal to fifteen (15%) percent of any and all gross monies or other considerations which I may receive as a result of my activities in and throughout the entertainment, amusement. music. recording and publishing industries, including any and all sums resulting from the use of my artistic talents and the results and proceeds thereof and, without in any manner limiting the foregoing, the matters upon which your compensation shall be computed shall include any and all of my activities in connection with matters as follows: motion pictures, television, radio, music, literary, theatrical engagements, personal appearances, public appearances in places of amusement and entertainment records and recordings, publications and the use of my name, likeness, and talents for the purposes of advertising and trade." (Emphasis supplied).

Obviously the contract between the parties involved interstate commerce because it contemplated the use of interstate communication, and the signing of a "major label

contract" indicates that McGraw made recordings that were offered for sale in many states.

Since the contract in question involved interstate commerce, its arbitration "clause is enforceable in this Court under the Federal Arbitration Act.

Conclusion

For all of the foregoing reasons, IT IS RECOMMENDED that the motion of the defendant, Samuel Timothy McGraw, to stay the proceedings in this Court and to enforce the arbitration clause in the contract between McGraw and Booth be GRANTED, and that this Court order this proceeding stayed and that arbitration proceed in the manner provided for in the arbitration agreement between the parties.

Under the provisions of 28 U.S.C. Sec. 636(b) (1) (C), the parties have ten (10) business days from service of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge before he makes a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL.

THUS DONE AND SIGNED at Alexandria, Louisiana, on this 24th day of August, 1993.

UNIT STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
Monroe Division

Carol Marie McCoy Booth
Plaintiff

Civil Action No. 93-0741
Judge Tucker L. Melancon

v

Samuel Timothy McGraw
Defendant

ORDER

Filed: 9/16/93

For the reasons contained in the Report and Recommendation of the Magistrate Judge previously filed herein, and after an independent review of the entire record, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that the motion of the defendant, Samuel Timothy McGraw, to stay the proceedings in this Court and to enforce the arbitration clause in the contract between McGraw and Booth is GRANTED, and that this proceeding is hereby stayed.

IT IS FURTHER ORDERED that arbitration proceed in the manner provided for in the arbitration agreement between the parties.

THUS ORDERED AND SIGNED, in Cha ers, at Louisiana, on this day of , 1993.

DONALD E. WALTER , JUDGE
UNITED STATES DISTRICT COURT

MEMORANDUM OF STATUS CONFERENCE

Judge Tucker L. Melancon

November 3, 1994

Carol Marie McCoy Booth
versus
Samuel Timothy McGraw

Civil Action No. 3:93-0741

Filed: 11/7/94

* * * * * * * * * *

A status conference in this matter was held on November 3, 1994 by District Judge Tucker L. Melancon William A. Hargiss appeared on behalf of the plaintiff, and James E. Patton, II appeared on behalf of the defendant.

The Court directs that arbitration take place in Louisiana pursuant to the rules of the American Arbitration Association as called for in the arbitration agreement.

Based on representations made by defendant's counsel, the plaintiff is instructed to initiate arbitration on or before November 17, 1994. Defendant's attorney is directed to provide the Court with authority, before the close of business today, for the proposition that the plaintiff has the obligation of initiating arbitration.

Plaintiff is ordered to submit a written report to the Court on or before November 17, 1994 detailing the steps that have been taken to initiate arbitration and the status of such arbitration.

The parties are required to submit a joint report, prepared by the plaintiff and signed by both parties, on a quarterly basis beginning February 3, 1995. The report shall detail the progress made in this case.